Supreme Court, U.S.
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In the Supreme Court of the United States

KEVIN NIXON AND BRANDON ANCELET,

Petitioners,

v.

BURYL WHEATLEY AND P.D. GEORGE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether a plaintiff may appeal an order denying a motion to remand to state court after accepting an offer of judgment under Federal Rule of Civil Procedure 68 if the plaintiff effectively reserves the right to appeal and how can such right be reserved?

2. If the plaintiff in the previous question fails to effectively reserve the right to appeal, may a federal court of appeals still review the order denying the motion to remand if the offer of judgment was invalid making the resulting judgment void?

3. Title 28 of the United States Code, Section 1446(d) provides in relevant part that: "[p]romptly after filing such notice of removal of a civil action, the defendant or defendants...shall a file a copy of the notice with the clerk of such state court, which shall affect the removal..." Defendants filed copy of the removal notice with the state court clerk twenty-two (22) days after filing the removal notice in federal district court. Was such filing "promptly" made in accordance with the statute? [28 U.S. Code § 1446(d)]

Parties to the Proceeding

The following constitutes a complete list of parties to the proceeding:

Petitioners: Kevin Nixon
Brandon Ancelet
Residents of Orange County, Texas and Plaintiffs/Appellants in the courts below.

Respondents: Buryl Wheatley
resident of Illinois
P.D. George Company, a corporate entity based in St. Louis, Missouri, is a member of ALTANA Chemie Group of Companies. However, to the best of Petitioners' knowledge, no parent or publicly held company owns 10% of more of the corporation's stock.

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Opinions Below

The decision of the district court is reported at 368 F. Supp. 2d 635 (E.D. Tex. 2005) The Fifth Circuit's opinion and order denying both petitions for panel rehearing and rehearing *en banc* were not reported. See Appendix App. 9.

Jurisdiction

This Court has jurisdiction over this case under 28 U.S. Code Section 1254(1). The Fifth Circuit issued its *per curiam* opinion and judgment dismissing the appeal on October 27, 2006. The order denying the petition for panel rehearing and rehearing *en banc* was entered December 11, 2006.

Statutory Provisions Involved

The relevant text of Federal Rule of Civil Procedure 68 and Title 28 U.S. Code Section 1446(d) are contained in the Appendix App. 10.

Statement of the Case

Petitioners were the plaintiffs in the district court below; respondents were the defendants.

Plaintiffs Kevin Nixon and Brandon Ancelet's pickup truck collided on January 3, 2003 with an 18-wheeler truck driven by Defendant Buryl Wheatley who Plaintiffs allege was in the course and scope of his employment with P.D. George Company at the time of accident. Plaintiffs contended that Defendant Wheatley was negligent while driving the 18-wheeler truck and that such negligence proximately caused the collision. (R. Vol. I, p. 207) Defendants denied liability (Vol. I., p. 20) Defendants also

served Plaintiffs with various discovery requests: request for disclosure, request for production, and a set of interrogatories to each Plaintiff. (Vol. I, p. 60-143) In addition, on March 1, 2005, Defendants noticed for written deposition all of both Plaintiffs' health care providers. (Vol. I, p. 144) Nevertheless, on January 26, 2005, Defendants filed their Notice of Removal with the United States District Court for the Eastern District of Texas, Beaumont Division. (Vol. I, p. 8) On February 16, 2005, Plaintiffs moved for remand back to the state courts. (R. Vol. I., p. 38) Plaintiffs urged three grounds for removal: (1) both defendants did not sign the notice of removal or a separate form agreeing to the removal notice (written consent to removal by all served defendants); (2) As of February 15, 2005, Defendants had failed to file copy of the notice of removal with the state court clerk; and (3) Defendants waived their right to remove by filing considerable discovery in state court. (Vol. I, pp. 38-39) Defendants filed a vigorous response. (Vol. I, p. 45, 167)

On March 24, 2005, the district court entered a Memorandum Opinion and Order denying the Motion to Remand. (Vol. I., p. 172-181) The district court rejected all three grounds for removal urged by Plaintiffs. The district court also held that Defendants' actions in delaying the filing of the copy of the removal notice for twenty-two (22) days with the state court clerk was "reasonably prompt under the circumstances, and remand based on undue delay in filing the notice of removal in state court is inappropriate." (Vol. I, p. 178) Finally, the district court held that Defendants' actions in engaging in discovery prior to removal and afterwards did "not indicate an intent on behalf of Defendants to waive their right to remove." (Vol. I, p. 180) Accordingly, the Plaintiffs' Motion to Remand was denied. Id.

Eleven (11) days later, Plaintiffs filed a Motion for Reconsideration and/or Certification under 28 U.S. Code Section 1292(b) asking the district court to reconsider the denial of their Motion to Remand and/or in the alternative, moves for certification under 28 U.S. Code Section 1292(b) so that the order may be certified for interlocutory appeal. (Vol. I, pp. 182-188) However, on April 12 2005, the district court denied both the Motion for Reconsideration and/or Certification under 28 U.S. Code Section 1292(b). (Vol. I, p. 209)

Plaintiffs next petitioned the Fifth Circuit for a Writ of Mandamus and moved for stay pending its consideration. See *In re Kevin Nixon; Brandon Ancelet*, Petitioners, Cause No. 05-40579 (5th Cir. 2005) The Fifth Circuit denied both the Motion to Stay and the Petition for Writ of Mandamus. (Vol. I, p. 219) (Order, May 5, 2005)

After conducting discovery and filing a Motion for Partial Summary Judgment, Defendants made an offer of judgment under Rule 68, Fed. R. Civ. P. to Plaintiffs which Plaintiffs accepted. (Vol. I, p. 337) Plaintiffs successfully reserved 'the right to appeal any interlocutory orders merged within the final judgment (to wit: denial or Motion to Remand, etc.)" Id. On December 19, 2005, the district court entered its Final Judgment based upon the offer or judgment and ruled: "all relief not herein granted is denied." (Vol. I, p. 344) On January 13, 2006, Plaintiffs filed their Notice of Appeal specifying the order 'denying Plaintiffs' Motion to Remand dated 3/24/2005" and the order denying the 'Motion for Reconsideration". (Vol. I, p. 345) Hence, Plaintiffs Kevin Nixon and Brandon Ancelet appealed to the Court of Appeals for the Fifth Circuit.

After the case was fully briefed and matter set for oral argument, Respondents filed a Motion to Dismiss the

Appeal to which Petitioners responded to the Motion arguing among other things that the 'Rule 68 offer was invalid making the judgment void." (Response page 3) This contention had been previously made in the Reply Brief on October 10, 2006. The Court of Appeals initially ordered that the motion to dismiss the appeal is 'carried with the case." Then, just before oral argument, the Clerk of the Court of Appeals advised that the matter would be submitted without argument. Then, on October 27, 2006, the Fifth Circuit entered its *per curiam* opinion and order granting the Motion to Dismiss (App. 8) Nixon and Ancelet filed both a petition for panel rehearing and a petition for rehearing *en banc*. The Fifth Circuit denied both petitions on December 11, 2006.

Reasons for Granting the Petition

I. This cases raises issues important to federal civil jurisprudence such as the proper interpretation of a Federal Rule of Civil Procedure, etc., which have not been, but should be settled by this Court.

In *Marek v. Chesny*, 473 U.S. 1 (1985), this Court granted certiorari based upon the importance of the question itself. 'This case requires us to decide whether the offer in this case was a proper one under Rule 68 [Fed. R. Civ. P. 68], and whether the term 'costs" as used in Rule 68 includes attorneys' fees awardable under 42 U.S.C. 1988." 473 U.S. at 5. This Court in *Marek* also cited its previous decision in *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981). In the *Delta Airlines* case, this Court also granted certiorari on the mere importance of the question. (construction of rule 68) 450 U.S. at 350. Therefore, the proper construction of Fed. R. Civ. P. 68 is a question important to federal civil jurisprudence.

Here, this case involves questions of construction of Federal Rule of Civil Procedure 68 as well as an Act of Congress [28 U.S. Code Section 1446(d)]. Petitioners urged in their initial Brief that they 'effectively reserved their right to appeal the order denying their motion to remand." Appellant's Brief pp. 18-24. Respondents asserted that in the Fifth Circuit, a consent judgment cannot be appealed even when the parties agree to allow the appeal. *Cf. Amstar v. Southern Pacific Transp.*, 607 F.2d 1100 (5th Cir. 1979) *cert. den.* 449 U.S. 924 (1980) When *Amstar* was reviewed by this Court, the denial of certiorari drew a vigorous dissent from Justice Blackmon. See 449 U.S. at 924-925. More recently, the Fifth Circuit recognized citing the Eleventh Circuit in *Shores v. Sklar* 885 F.2d 760 (11th Cir. 1989) that in a class action context, a Rule 68 judgment may be

appealed if the plaintiff reserves the right to appeal. See *Dugas v. Trans Union Corp.*, 99 F.3d 724, 728 (5th Cir. 1996) Other Federal Courts of Appeals allow appellate review from a consent judgment if there is an explicit reservation of a right to appeal. See e.g. *Verzilli v. Flexon* 295 F.3d 421, 423 (3rd Cir. 2002) (recognizing the exception and questioning *Amstar*). For this very reason, Petitioners sought *en banc* determination by Fifth Circuit, which was denied. After this denial and the filing of a Reply Brief, the Fifth Circuit notified the parties that the case was selected for oral argument. Thereafter, Respondents filed a Motion to Dismiss the Appeal to which Petitioners filed a Response. In both the Reply Brief and Response to Motion to Dismiss, Petitioners pointed out that the offer of judgment was void because it did not allocate the offer between the two plaintiffs. See Reply Brief pp. 2-3; Response to Motion to Dismiss pp. 3-4. Two Courts of Appeals have held that an unallocated offer of judgment to multiple plaintiffs is not effective under Rule 68. *Thomas v. NFL Players Assn.*, 273 F.3d 1124 (D.C. Cir. 2001); *Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071 (7th Cir. 1999) The *Gavoni* and *Thomas* decisions were cited in the Petition for Rehearing *en banc* filed by Petitioners. Despite Petitioners' arguments, the Fifth Circuit, in its *per curiam* Opinion and Order held:

> A party must reserve its right to appeal prejudgment rulings in the offer of judgment, otherwise no appeals from judgment will be allowed.' *Ramming v. Natural Gas Pipeline Co. of Am.*, 390 F.3d 366, 370 (5th Cir. 2004) (emphasis in original). Plaintiffs' failure to do so here extinguished their right to appeal, and their subsequent statement purporting to reserve this right could not resurrect it.

(App. – 8, A-19, Opinion and Order dated 10-27-2006)

Then, the Fifth Circuit granted the Motion to Dismiss the Appeal. Petitioners filed both a panel Petition for Rehearing and a Petition for Rehearing *en banc*. Both petitions were denied by Fifth Circuit Order dated December 11, 2006.

What Fifth Circuit held was that the reservation of the right to appeal must be included in the offer of judgment itself or else, no appeal may be had. *Id.* the text of Rule 68 Fed.R.Civ.P. does not speak to the issue of reserving the right to appeal. None of the Courts of appeals from other circuits have held that a reservation of the right to appeal a judgment based on a Rule 68 offer must be in the offer of exact acceptance itself. This issue is a matter that is unquestionably important and should be settled by this Court.

Other Federal courts of Appeal in a non-Rule 68 context have held that a reservation of right to appeal a consent judgment can take various forms. It can be contained in the stipulation between the parties. See *Verzilli v. Flexon*, 295 F.3d at 424. See also *Juntunen v. Sea-Con Services, Inc.* 879 F.2d 154, 155 (5th Cir. 1989) (settlement agreement making "a specific and complete reservation of all rights...with regard to the ruling of this Court issued on August 9, 1998..") The Third Circuit Court of Appeals held that the plaintiff made a sufficient reservation of her right to appeal a consent judgment. *Brzozowski v. Correctional Physician Services*, 360 F.3d 173 (3rd Cir. 2004) Plaintiff sought to review an interlocutory order refusing joinder of an additional party. Plaintiff agreed to a stipulation of judgment to be taken against the Defendant. 360 F. 3d at 176. In accordance with the stipulation the district court entered judgment . *Id.* The intention to appeal was not included in the stipulation, it was made clear in a letter by plaintiff's

counsel to the district court forwarding the stipulation for approval and filing. *Id.* the Court of Appeals stated:

> Although it would have been the better practice to add a statement to that effect in the stipulation itself, we are satisfied that the letter was adequate to establish plaintiff's intent to appeal. We conclude, therefore, that the objections to our jurisdiction must be denied. 360 F.3d at 176-177 (emphasis added).

Although a Rule 68 offer of judgment was not mentioned, the stipulation in *Brzozowski* was very close in fact to the Rule 68 offer and acceptance in this case. If a letter can preserve the right to appeal, the Notice of Acceptance was more than adequate to do the same in this case. Further, this Court has ample discretion to review a district court's refusal to remand a lawsuit back to state court notwithstanding plaintiff's later consent to the entry of final judgment. See *BIW Deceived v. Local S6*, 132 F.3d 824, 828-829 (1st Cir. 1997) Their motion sought a 'final and appealable judgment." *Id.* The record showed the 'plaintiff' unequivocal intention." *Id.* Plaintiff did not waive his right by failing to seek an interlocutory appeal. It is significant in the *BIW* case that the Defendant did not specifically agree to the right of appeal; it simply 'agreed not to oppose the entry of judgment in its favor." 132 F. 3d at 828.

Accordingly, a "gap" exists those previously mentioned authorities and the ruling of the Fifth Circuit. The questions of how the right to appeal may be properly reserved in an offer of judgment situation will reoccur in future cases. See *Shores v. Sklar* (11th Circuit); *Dugas v. Trans Union* (5th Circuit); *Ramming* (5th Circuit), etc. This Court should intervene and settle the matter once and for all.

Further, if this Court determines that Petitioner did not properly reserve their right to appeal, this Court should next look at a vital issue ignored by the Fifth Circuit; but deemed important by this Court in *Marek v. Chesny*: is offer of judgment in this case a valid one?

Respondent's offer of judgment states:

> Pursuant to Federal Rule of Civil Procedure 68, Defendants Buryl Wheatley, and P.D. George Company make the following offer of judgment to your clients, Kevin Nixon and Brandon Ancelet. Defendants Buryl Wheatley and P.D. George Company agree to allow Plaintiffs Kevin Nixon and Brandon Ancelet to take judgment against them for the sum of $45,000.00. This offer of judgment includes all of your clients' costs and attorneys' fees now accrued...
>
> (R. p. 340; Exhibit 2, Motion to Dismiss)

Does this offer of judgment meet the requirements of Rule 68? Petitioners say NOT. This Court in *Basha v. Mitsubishi Motor Credit Corp.*, 336 F.3d 451 (5th Cir. 2003) recognized that Rule 68 offers must provide a clear baseline from which Plaintiffs may evaluate the merits of their case relative to the value of the offer. *Basha* cited two cases from other circuits with approval: *Thomas v. NFL Players Assn.*, 273 F.3d 1124 (D.C. Cir. 2001) and *Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071 (7th Cir. 1999) Both of these cases held that an unallocated offer of judgment to multiple plaintiffs is not effective under Rule 68. See *Thomas* 273 F.3d at 1130; *Gavoni*, 164 F.3d at 1076. *Basha* dealt with the validity of an offer of judgment which "purported to settle all claims, yet failed to quantify damages." *Id.* No Fifth Circuit

authority exists on this exact point. If the D.C. and Seventh Circuits are correct in their interpretation of Rule 68, then Defendants' Rule 68 offer was invalid.

If the Rule 68 offer is invalid, does it follow that the judgment based upon such offer is void? That controversy presents another matter, which should be settled by this Court. If the Rule 68 judgment is void, the Court should hold that the order denying the motion to remand may be reviewed. Voidness of a judgment will reach situations where the parties' failure to follow relevant law or procedure in securing the judgment will undermine its ultimate validity. See *Carter v. Fenner*, 126 F.3d 1000,1005 (5th Cir. 1998) [construing Fed.R.Civ.P. 60(b)(4) and holding that a consent judgment is void where the parties fail to follow the state statutory requirements regarding settlement of a minor's claim.] However, rather than just vacating the Fifth Circuit's order and the district court's judgment, this Court should review the merits of the removal/remand appeal since the lower federal courts disagree on how to interpret the term "promptly" as that term is used in 28 U.S. Code Section 1446(d). Thus, Petitioners submit that this case involves questions important to federal civil jurisprudence, which should be resolved by this Court.

II. The Fifth Circuit's ruling clashes with prior decisions from other federal courts of appeals.

The Fifth Circuit's ruling conflicts with other decisions from other Federal Court of Appeals in the various circuits. The Fifth Circuit was undoubtedly influenced by its previous decision in *Amstar v. Southern Pacific Transp. Co.* 607 F.2d 1100 (5th Cir. 1979) *cert. den.* 449 U.s. 924 (1980). *Amstar* held contrary to other authorities that a consent judgment may not be appealed even with consent of the parties. In their Motion to Dismiss the appeal, Respondents relied heavily on *Amstar* and never even cited *Ramming* for a different proposition. Therefore, the Fifth Circuit's construction of Rule 68 which held that a reservation of right to appeal must be in the offer of judgment itself operated as a surprise. The practical significance of this ruling is only that the Defendant may appeal the judgment since Rule 68 only allows Defendants to make offers of judgment. A plaintiff would be allowed to appeal only though the "grace" given by the Defendant. However, if such right is not written into offer of judgment, then, no such right to appeal exists. In a non Rule 68 context, Federal Courts of Appeal differ on the question of whether the right to appeal was sufficiently reserved. The Third Circuit in *Brzozowski v. Correctional Physician Services*, 360 F.3d at 176-177 held that a mere letter by plaintiff's attorney to the district court was sufficient to reserve the right to appeal. the parties' stipulation did not include any mention of the intent to appeal. *Id.* Also, the First Circuit in *BIW Deceived v. Local S6*, 132 F.3d 824, 828-829 held that the Court of Appeals had ample discretion to review a district's refusal to remand despite the plaintiff's consent to judgment. The defendant in that case did not even specifically agree to the right of appeal. 132 F.3d at 828. Petitioners expressly reserved their right to appeal in their Notice of Acceptance (R. Vol. I., p. 337) The district court entered judgment afterwards. The

Fifth Circuit held that the notice was ineffective to reserve the right to appeal. (App. 9) This ruling conflicts with that of the Third Circuit in *Brzozowski* and that of the First Circuit in *BIW*. Even without a reservation of rights, other Federal Courts of Appeals recognized that Rule 68 judgments may be appealed. See *Colonial Penn Ins. Co. v.* Coil, 887 F.2d 1236 (4th Cir. 1989); *Whitaker v. Associated Credit Services, Inc.*, 946 F. 2d 1222 (6th Cir. 1991)

III. This case also involves the proper interpretation of an Act of Congress [28 U.S. Code Section 1446(d)] upon which lower federal courts are divided.

A. The district court erred in ignoring the established rules of statutory construction in determining whether Defendants acted 'promptly" as required by 28 U.S. Code Section 1446(d).

Plaintiffs Nixon and Ancelet timely filed a Motion to Remand the case back to state court. Among the grounds for remand, was the assertion that Defendants failed to 'promptly" file a copy of their removal notice with the state court clerk as required by 28 U.S. Code Section 1446(d). Defendants do not dispute that the copy of the removal notice was filed with the state district clerk twenty-two (22) days later. The question remains: was this action 'prompt'? 28 U.S. Code Section 1446(d) provides:

> Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such state court, which shall effect the removal and the state court shall proceed no further unless and until the case is remanded. (emphasis added)

So, what does 'promptly" mean with respect to 28 U.S. Code § 1446(d)? In all cases involving statutory construction, the Court's starting point must be the language employed by Congress. *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432 (1999) The term 'promptly" is not defined by statute. Therefore, in the absence of a specific definition, a statutory term must be construed in accordance with its ordinary or natural meaning. *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994) In other words, the statute's 'plain meaning" must be given effect. See *Nat. Bank of Oregon v. Independent Ins. Agents of America Inc.*, 508 U.S. 439 (1993). The plain meaning of a statute is conclusive except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) In addition to the 'plain meaning" rule, a court must construe the removal statutes strictly against the removing party. *Lefall v. Dallas Indep. School Dist.*, 28 F. 3d 521, 524 (5th Cir. 1992). See also, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941) (mandating strict construction of removal statutes.)

Petitioners submit that the plain meaning of the statute together with the rule of strict construction of the removal statutes mandates the conclusion that Defendants did not act 'promptly" in filing a copy of the removal notice with the state court clerk as required by statute. This Court has held that the plain meaning of a statute is to be ascertained using standard dictionaries in effect at the time of the statute's enactment. *Lamar v. United States*, 241 U.S. 103, 113 (1916) the term 'promptly" was first used in the 1949 amendments to the statute. The Historical and Revision Notes of the 1949 Act, 63 Statutes at Large 101 (May 24, 1949) state: "...this amendment clarifies the intent of section 1446(e) of title 28 [now Section 1446(d)] to indicate that notice need not be given simultaneously with the filing (in

federal court), but may be given promptly thereafter." (emphasis added) Therefore, Petitioners will tender the appropriate definitions to aid in construction of the statute.

The district court, however, did not attempt such construction. After viewing the text of the statute, the Court below cited a district court decision (from another circuit) *Parker v. Malone,* 2004 WL 190430 (W.D. Va. 2004), which in turn cited Volume 14C. *Wright, Miller & Cooper, Federal Practice & Procedure* § 3736 (3d ed. 1998) See Memorandum and Order, page 6, 368 F. Supp. 2d at 640. The Court below also noted another district court decision from outside the circuit, *Manufacturers & Traders Trust Co. v. Hartford Accident & Indem. Co.,* 434 F. Supp. 1053, 1055 (W.D.N.Y. 1977) which acknowledged that in the context of the statute [1446(d)], 'the word 'promptly' has not been construed to mean simultaneously." *Id.* Other than that, the district court did not discern the plain meaning of "promptly". 368 F. Supp. 2d at 640. The district court proceeded to note that filing a copy of the notice of removal in state court is a procedural act and failure to do so does not defeat the federal court's jurisdiction. *Id.* Then, the district court while noting that the state court took no action during the delay held that Defendants' 'actions in effecting removal were reasonably prompt under the circumstances" and that remand based upon that ground was 'inappropriate." 368 F. Supp. 2d at 640 (opinion page 7) Accordingly, the district court made no attempt at construction of the term "promptly" in its plain meaning. The district court gave no reason why the "plain meaning" of the term "promptly" would be at odds with the statute's drafters. See *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. at 242. Also, the district court failed to give "promptly" a strict construction as Congress has intended for removal statutes. This failure runs contrary to this Court's policy of strict construction of the removal statutes. Actually, the district court gave a liberal not strict

construction of the term 'promptly." It follows that the district court ignored the established rules of statutory construction: 'plain meaning" coupled with strict construction in construing 28 U.S. Code Section 1446(d).

B. 'Promptly" as used in 28 U.S. Code Section 1446(d) means physically filed or placed in the mail by the next day after filing the removal notice in federal court.

Petitioners submit that after construing the plain meaning of the term 'promptly" as used in 28 U.S. code Section 1446(d) coupled with the rule of strict construction, 'promptly" means that a copy of the removal notice must be physically filed with the state court clerk or placed in the U.S. mail by the next day after filing the removal notice in federal district court. Plaintiffs assert that the general rule should have only two exceptions: (1) if extraordinary circumstances cause a delay in filing or serving notice and (2) if the next day after the removal notice is filed in federal court falls on a Saturday, Sunday, or federal holiday.

Removal remains a creature of statute; therefore, the removal statute requires compliance with its terms. See *Babbitt v. Clark,* 103 U.S. 606, 607 (1880)(The right to remove from a state court to a federal court being statutory, all the requirements of the statute must be followed.) See also, *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. at 107 (The right to remove an action from a state to a federal court turns on the meaning of the removal statute.)

28 U.S. Code Section 1446(d) requires defendants and their counsel to take certain steps 'promptly after" filing the notice of removal in federal court. The defendants or their counsel must give written notice to the Plaintiffs or their counsel. ("... shall give written notice thereof to all

adverse parties...") The defendants or their counsel must also file a copy of the removal notice with the clerk of the state court. ("... shall file a copy of the notice with the clerk of such state court, which shall effect the removal...") 28 U.S. Code Section 1446(d).

Further, this statutory language remains subject to strict construction. More than sixty years ago, this Court stated:

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for strict construction of such legislation. (removal statutes) The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' (citations omitted)

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. at 108-109.

So, how do we construe the term "promptly" in its plain and ordinary meaning and strictly so as to comply with the will of Congress? Since the statutory language was

adopted in 1949, we should start by consulting the standard dictionaries available at that time. See *Lamar*, 241 U.S. at 113.

Black's Law Dictionary, Third Edition 1933, defines "promptly" as the "adverbial form of the word "prompt" which means ready and quick to act as the occasion demands... The meaning of the word depends largely on the facts of the case." *Webster's New International Dictionary of the English Language, Second Edition* 1941 (p. 1981) defines "prompt" in describing action : 1. Ready and quick to act as the occasion demands; responding instantly; alert; 2. Done or rendered readily or immediately; given without delay or hesitation; as, prompt assistance or decisions. The word "prompt" is synonymous with "punctual, ready, expeditious." "Prompt implies quick or instant action (often with alacrity) as occasion demands." *Id.* "Expeditious which is characterized by, or leads to, prompt or speedy performance." *Id.*

In the context of the average defense attorney in complying with the statutory removal procedure, "promptly after" means that actions to give notice of the removal must take place immediately after the filing of the removal notice in federal court. These actions can be done that day if practicable. The average defense attorney can serve notice to Plaintiff and/or his attorneys under Rule 5(b) F.R. Civ. P. which includes personal delivery, mail ("service by mail is complete on mailing"), or electronic means. *Id.* The average defense counsel usually serves notice to opposing counsel on the same day he files the pleading. However, notice to the state court clerk remains a different matter. 28 U.S. Code Section 1446(d) requires the defendant or his attorney to "file a copy of the removal notice" with the clerk of the state court. This operative act "effect[s] the removal." See *Anthony v. Runyon*, 76 F.3d 210, 214 (8th Cir. 1996) The

federal rules note the difference between service by mail and filing papers with the court. Compare Rule 5(b) F. R. Civ. P. with Rule 5(e) F.R Civ.P. The filing of a document by mail is not complete until it is received by the clerk's office. See *McIntosh v. Antonino*, 71 F. 3d 29, 36 (1st Cir. 1995) It would be better practice if the federal and state courthouses are not more than one hundred (100) miles apart, to file the removal notice in the federal court, then file a copy of the removal notice (preferably filed stamped) with the clerk of the state court immediately afterwards. Both actions should not take more than three (3) hours. In this case, the distance between the federal courthouse (300 Willow, Beaumont, Texas) and the state courthouse (801 W. Division, Orange, Texas) was approximately 24.7 miles. This entire process could have been completed within one hour (to include travel time). In proper context, "promptly" could mean on the same day if practicable.

The pre-1949 definition stays consistent with the more contemporary definitions. A pocket version of *Webster's New English Language Dictionary* defines "promptly" (adverb) on page 174 as "as quickly as possible." See *Webster's Id.* (Popular Group 2004) Promptly has been defined also as follows: "Carried out or performed <u>without delay</u>." See *Webster's Id.* (Popular Group 2004) (emphasis added); "done, spoken etc. <u>without waiting</u> See *Webster's Id.* (Popular Group 2004) (Wiley 1998) (emphasis added); "done, performed, delivered, etc. <u>at once or without delay</u>" *Random House Webster's Unabridged Dictionary* (p. 1548) (2nd *Ed. Random House 2001*) (emphasis added); "done quickly and <u>without delay</u>" (prompt) *Cambridge Dictionary of American English* (2004) (emphasis added) and "in a prompt manner, readily, quickly, directly, <u>at once</u>, <u>without a moment's delay</u>." *Oxford English Dictionary* Vol. XII p. 620 (2nd Ed. Clarendon Press 1989) (emphasis added). A consensus of all definitions, old and contemporary, appears

that the term "promptly" means that the removal notice must be filed or served "immediately and without delay." In the context of the average attorney serving or filing motions or notices, "promptly" means either the same day that the removal notice is filed or the next day if that day is a normal business day excluding Saturdays, Sundays, and legal holidays. Petitioners submit that the above definition of "promptly" constitutes its "ordinary and plain" meaning coupled with a strict construction of that term.

The federal courts differ in their interpretation of the meaning of "promptly" Compare *Colletti v. Ovaltine Food Products*, 274 F. Supp. 719, 723 (D.P.R. 1967) (five (5) day delay not prompt); *Rubio v. Allegheny Intern. Inc.*, 659 F. Supp. 62 (S.D. Fla. 1987) (forty-two (42) day delay held not prompt); *Doherty v. Goslin*, 2000 U.S. Dist. Lexis 15083 (E.D. Pa. 2002) (twenty-seven (27) day delay held not prompt); *La Maina v. Brannon*, 804 F. Supp. 607 (D.N.J. 1992) (four (4) day delay held not prompt) with *Barrett v. Southern Ry. Co.*, 68 F. R. D. 413 (D.S.C. 1975) (seven (7) days delay held prompt); *Master Equipment, Inc. v. Home Insurance Co.*, 342 F. Supp. 549 (E.D. Pa. 1972) (nine (9) days held prompt); *Alpena Power Co. v. Utility Workers Union of America, Local 286*, 674 F. Supp. 1286 (E.D. Mich. 1987) (thirteen (13) day delay held prompt); *Calderon v. Pathmark Stores, Inc.*, 101 F. Supp. 2d 246 (S.D.N.Y. 2000) (thirty-five (35) day delay held prompt); *Manufacturers & Traders Trust Co. v. Hartford Acc. Co.*, 434 F. Sup. 1053 (W.D.N.Y. 1977) (forty-five (45) day delay held prompt); *Parker v. Malone*, 2004 WL 190430 (W.D.Va. 2004) (twenty-two (22) day delay held prompt); *Nixon v. Wheatley*, 368 F. Supp. 63 (E.D.Tex. 2005)(same) and *Whitney v. Wal-Mart Stores, Inc.*, 2004 L 1941345 (D. Me 1004) (six month delay held prompt) Except for a couple of instances, most of these cases did not rely on the statutory language in 28 U.S. Code Section 1446(d), but on other cases and Wright, Miller

and Cooper, *Federal Practice and Procedure*, Section 3736 (3rd ed. 1998). (remand may be appropriate 'when there is undue delay.") Petitioners assert that although the cases differ with varying terms of delay, the basic operative facts which take place every time a defendant's counsel serves or files a removal notice will not change. An exception should exist when factual circumstances cause a delay in service or filing e.g. when a hurricane strikes the area. This situation does occur. See *e.g. Arnold v. CSX Hotels, Inc.*, 212 F. Supp. 2d 643 (S.D. W.Va. 2002) (defendant acted in good faith in mailing copy of removal notice to plaintiff's counsel). Petitioners submit that their proposed interpretation more accurately reflects the actual intention of Congress in 1949, The legislative history provides no help discerning this intention. See 1949 U.S. Congress and Admin. News. P. 1268 (USPO 1949) ['In addition, this amendment clarifies the intent of section 1446(e) (now 1446(d)) of Title 28 U.S.C., to indicate that notice need not be given simultaneously with the filing, but may be given promptly thereafter."] Section 83, H.R. 3762 1949 Act. House Report No. 352. See also, *State of South Carolina v. Moore*, 447 F.2d 1067, 1073 n. 16 (4th Cir. 1971) (noting the statutory changes in the 1949 Act when the initial words 'promptly after" were substituted for 'upon") Such a proposed interpretation would minimize any time period where federal and state courts share concurrent jurisdiction and prevent any prejudice to Plaintiffs relying on a state forum. It makes it less likely that federal district courts will deal with the problem of default judgments rendered in state courts. This Court should adopt Petitioners' proposed interpretation of 'promptly" and reverse the district court's rulings. A twenty-two day delay is not 'prompt" and should not comply with 28 U.S. Code Section 1446(d).

IV. The Fifth Circuit's decision has so far departed from the accepted and usual course of judicial proceedings

as to call for an exercise of this Court's supervisory power.

Petitioners have demonstrated that the Fifth Circuit so far has sanctioned the district court's departure in ignoring the well-established canons of statutory construction with respect to an Act of Congress, to wit: 28 U.S. Code Section 1446(d). Petitioners requested interlocutory appeal of the order denying the motion to remand. However, permission was denied by the district court. Next, Petitioners attempted review by mandamus with the Fifth Circuit. That attempt was denied. When Respondents made an offer of judgment to Petitioners, Petitioners reserved the right to appeal the denial of the remand motion in the notice of acceptance filed with the district court. Nevertheless, the Fifth Circuit held that 'failure to (reserve its right to appeal prejudgment rulings in the offer of judgment)...extinguished [Petitioners] right to appeal." (App. 8)

An order denying a motion to remand a case back to state court remains an interlocutory and unappealable order. It is not a 'collateral order." Its denial cannot be remedied by a writ of mandamus to this Court. See *In re Politz*, 206 U.S. 323 (1907) Such order can conceivably be reviewed upon final judgment. However, after full consideration of the merits, review will be unlikely. *Caterpillar, Inc. v.* Lewis, 519 U.S. 61 (1996).

Most of the lower federal court decisions construing the term 'promptly" in 28 U.S. Code Section 1446(d) arrived at their rulings not by ascertaining the statute's 'plain meaning" or subjecting the statute to "strict construction" as directed by this Court. These lower courts considered other district court rulings and used secondary sources. See cases cited on page 17 of the Petition. This approach has resulted

in a disarray of authority, which can only be corrected by this Court's intervention.

Fifth Circuit's own action deprived Petitioners of a meaningful opportunity to be heard on an important issue of law. Petitioners' right to have their case determined in a state forum deserves protection from this Court. As the Court of last resort in the federal system, this Court has supervisory power over the lower federal courts and therefore, must occasionally perform a pure error-correcting function in federal litigation. See *Florida v. Rodriguez*, 469 U.S. 1,7 (1984) (Stevens J. dissenting) This case demonstrates the erosion of the legal principles established by Congress in the removal statutes, the strict interpretation of removal statutes and the frustrating inability of a plaintiff to obtain appellate review of a district court's order denying his Motion to Remand the case back to the state court. A proper interpretation of a Federal Rule of Civil Procedure remains important to the lower federal courts. Does Rule 68 allow for a reservation of rights to appeal? Does such allowance go against the Rule's purpose? How does one reserve a right of appeal in the context of the Rule?

The Fifth Circuit in our case citing its prior decision in *Ramming v. Natural Gas Pipeline* held that such reservation must be in the offer itself. However, the facts of *Ramming* differ from the facts in our case. In *Ramming*, a defendant appealed a summary judgment granted for the plaintiffs and a refusal of the district court to enter a judgment based upon Rule 68 Fed.R.Civ.P. offer.

The defendant in its own offer of judgment to the plaintiff, which was accepted, reserved the right to appeal the district court's summary judgment. 390 F.3d at 371. This case unlike *Ramming* involved plaintiffs seeking to reserve the right to appeal a pretrial ruling. The Court of Appeals in

Ramming cited the Eleventh Circuit in *Shores v. Sklar*, as support for the proposition. 390 F.3d at 370. In *Shores*, a class representative appealed the district court's denial of his motion to certify a class. Shores accepted an offer of judgment then filed with the district court notice of his acceptance of the offer. 885 F.2d at 762. Nowhere in the offer, notice of acceptance, etc. did Shores manifest his intention to appeal the order denying class certification. 885 F.2d at 763. By contrast, Petitioners in the notice of acceptance filed in district court reserved the right to appeal the order denying their Motion to Remand. (R. Vol. I, p. 337) Therefore, the facts in this case differ from those in *Ramming* or *Shores v. Sklar*, So, what forms the basis of the Fifth Circuit's ruling? Why do the principles stated in *Ramming* or *Shores* apply to this case even though the facts are different?

Accordingly, the answer must be found in the proper interpretation of Rule 68 Fed.R.Civ.P. This interpretation should be made by this Court if not, the situation in this case, *Ramming, Shores, Dugas.* etc. will reoccur again and again. Only a party "defending against a claim" may serve a Rule 68 offer upon his opponent. However, "either party may then file the offer and notice of acceptance together with the proof of service thereof and thereupon, the clerk (or district court) shall enter judgment." Rule 68 Fed.R.Civ.P. The text of Rule 68 requires either party to file the offer and acceptance in order to empower the clerk (or the district court) to enter judgment. Petitioners submit that a plaintiff can reserve the right to appeal pretrial ruling in his Rule 68 acceptance or a writing filed in proximity to that acceptance. Petitioners further submit that an invalid Rule 68 offer makes the resulting judgment void. In every case, where a question is raised on appeal concerning the validity of the Rule 68 offer, a Court of Appeals should decide the issue and if the offer is held invalid, the appellate court should vacate the

judgment and remand the case back to the district court. These failures by the lower federal courts can only be corrected by this Court.

Conclusion

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: March 12, 2007

Appendix 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

KEVIN NIXON and BRANDON ANCELET	§	
Plaintiffs,	§	
	§	
versus	§	CIVIL ACTION NO.
	§	1:05-CV-051
BURYL WHEATLEY and P D GEORGE COMPANY,	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending before the court is Plaintiffs Kevin Nixon ("Nixon") and Brandon Ancelet's ("Ancelet") Motion to Remand (#5). Plaintiffs seek remand to state court of this personal injuryaction against Defendants Buryl Wheatley ("Wheatley") and P D George Company ("George"),asserting that Defendants did not obtain written consent for removal from both Wheatley and George, Defendants failed to file a copy of the notice of removal with the state court in a timely manner, and Defendants waived their right to remove. Having reviewed the motion, the submissions of the parties, the pleadings, and the applicable law, the court is of the opinion that remand is not warranted.

I. Background

On December 30, 2004, Plaintiffs filed suit in the 260th Judicial District Court of Orange County, Texas, against Defendants, alleging that on January 3, 2003, they were injured when the vehicle in which they were riding collided with a

vehicle driven by Wheatley, who was allegedly operating a vehicle owned by George within the course and scope of his agency and/or employment with George. Plaintiffs allege that Wheatley was negligent in his operation of the vehicle and was negligent per *se* in violation of the Texas Uniform Traffic Act. *See* TEX. TRANSP. CODE ANN. §545.401.

On January 26, 2005, Defendants, who are represented by the same attorney, timely removed the case to federal court pursuant to 28 U.S.C. § 1441(a) on the basis of diversity of citizenship, alleging that complete diversity exists between the parties and that the amount in controversy exceeds $75,000.00, exclusive of interest and costs. *See* 28 U.S.C. § 1332. Defendants filed a copy of their notice of removal with the Orange County District Clerk's Office on February 17, 2005.

Plaintiffs filed their motion to remand on February 16, 2005, contending that the removal was procedurally defective on the grounds that both Wheatley and George did not sign the notice of removal or a separate form agreeing to the notice of removal, a copy of the notice of removal was not timely filed with the Orange County District Clerk's Office, and Defendants waived their right to remove by serving discovery requests upon Plaintiffs.

II. Analysis

A. Federal Jurisdiction in Removed Actions

"Federal courts are courts of limited jurisdiction." *Peoples Nat'l Bank v. Office of Comptroller of the Currency of United States,* 362 F.3d 333, 336 (5th Cir. 2004); *accord Howery v. Allstate Ins. Co.,* 243 F.3d 912, 916 (5th Cir.), *cert, denied,* 534 U.S. 993 (2001) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994)). Federal courts have subject matter jurisdiction and are

authorized to entertain causes of action only where a question of federal law is involved or where there is diversity of citizenship between the parties and the amount in controversy exceeds $75,000.00. *See* 28 U.S.C. §§ 1331, 1332; *Grupo Dataflia v. Atlas Global Group, L.P.*, 541 U.S. 567, , 124 S. Ct. 1920, 1923 n.l (2004); *Howery,* 243 F.3d at 914-15; *Hart v. Bayer Corp.*, 199*F.3d 239, 246 (5th Cir. 2000); *Allen v.R&H Oil & Gas Co.*, 63 F.3d 1326, 1330 (5th Cir. 1995). In a removed action, a district court is required to remand a case to state court if, at any time before final judgment, it determines that it lacks subject matter jurisdiction. *See* 28 U.S.C. § 1447(c). The removing party bears the burden of showing that federal jurisdiction exists and that removal was proper. *See Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002); *Howery,* 243 F.3d at 919; *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1408 (5th Cir.), *cert, denied,* 516 U.S. 865 (1995).

The existence of federal subject matter jurisdiction is determined at the time of removal from state court. *See Bissonnet Invs. LLC* v. *Quinlan,* 320 F.3d 520, 525 (5th Cir. 2003) (citing *Arnold* v. *Garlock,* 278 F.3d 426, 434 (5th Cir. 2002)). In order to determine whether jurisdiction is present, the claims set forth in the state court petition are considered as of the time of removal. *See Manguno,* 276 F.3d at 723; *Gebbia* v. *Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000); *Cavalliniv. State Farm Mut. Auto. Ins. Co.*, 44 F.3d 256, 264 (5th Cir. 1995). Any ambiguities are construed against removal because the removal statute is strictly construed in favor of remand. *See Bosky* v. *Kroger Tex., LP,* 288 F.3d 208, 211 (5th Cir. 2002); *Manguno,* 276 F.3d at 723; *Acuna* v. *Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir.), *cert, denied,* 530 U.S. 1229 (2000).

1. Consent to Removal

The procedure for effectuating removal is set forth in

28 U.S.C. § 1446. *See Johnson v. Heublein, Inc.*, 227 F.3d 236, 240 (5th Cir. 2000). Section 1446(a) provides:

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action. 28 U.S.C. § 1446(a).

While not stated explicitly in the statute, removal generally requires the joinder or consent of all the named and served defendants. See *Gillis v. Louisiana,* 294 F.3d 755, 759 (5th Cir. 2002); *Jernigan* v. *Ashland Oil Co.,* 989 F.2d 812, 815 (5th Cir.), *cert, denied,* 510 U.S. 868 (1993); *Doe v. Kerwood,* 969 F.2d 165, 167 (5th Cir. 1992); *Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Servs.,* 925 F.2d 866, 871 (5th Cir.), *cert. denied,* 502 U.S. 866 (1991); *Getty Oil Corp. v. Insurance Co. ofN. Am.,* 841 F.2d 1254, 1261 (5th Cir. 1988); *McCrary v. Kansas City S. R.R.,* 121 F. Supp. 2d 566, 570 (E.D. Tex. 2000).

The courts have read the governing statute to mean that, "if there is only one defendant then that defendant may remove die case; however, if mere is more than one defendant, then the defendants must act collectively to remove the case." *Doe,* 969 F.2d at 167. Hence, although "[fjhere is no express

statutory requirement for joinder or consent by codefendants . . . the case law firmly establishes this requirement, which is known as the ' rule of unanimity.' *Spillers v. Tillman,* 959 F. Supp. 364, 368 (S.D. Miss. 1997) (quoting *Martin Oil Co. v. Philadelphia Life Ins. Co:,* 827 F. Supp. 1236. 1237 (N.D. W.Va. 1993)); *see Chicago, R. I. & P. Ry. Co.* v. *Martin,* 178 U.S. 245, 247-48 (1900).

The United States Court of Appeals for the Fifth Circuit has held mat there must be a timely filed, written indication from each served defendant, or from some person purporting to act formally on his behalf and with the authority to do so, that he has actually consented to removal. *See Gillis.* 294 F.3d at759; *Gem' Oil Corp..* 841 F.2d at 1262 n.i1; *Spillers,* 959 F. Supp. 2d at 369. "Although it is not necessary that all defendants sign the notice of removal, each defendant who has been served must at least communicate its consent to the court no later than thirty davs from the day on which the first defendant was served." *Id.* at 368. Under the general rule, the failure to include all defendants properly joined and served in the state action renders the notice of removal defective. *See Farias,* 925 F.2d at 871; *Acme Brick Co. v. Agrupacion Exportadora de Maquinaria Ceramica,* 855 F. Supp. 163, 165 (N.D. Tex. 1994). Nonetheless, such failure is a waivable, non-jurisdictional defect. *See Johnson,* 892 F.2d at 423; *Robertson v. Ball,* 534 F.2d 63, 64-65 (5th Cir. 1976); *Moody v. Commercial Ins. Co.,* 753 F. Supp. 198, 200 (N.D. Tex. 1990); *IntercoastalRefining Co. v. Jalil,* 487 F. Supp. 606, 608 (S.D. Tex. 1980).

In the case at bar, Wheatley and George are represented by the same counsel. In the notice * of removal, Defendants state that "both defendants file and join in this Notice of Removal." Plaintiffs assert that Defendants' notice was defective because neither Wheatley nor George signed the notice of removal "or a separate form agreeing to the notice of removal." Defendants, however, need not have personally

signed the notice of removal. *See Getty Oil Corp.*, 841 F.2d at 1262 n.ll. It is sufficient that consent to removal come "from some person purporting to act formally on [the defendant' s] behalf and with the authority to do so." *Id.*; *accord Gillis,* 294 F.3d at 759. Here, Defendants' counsel had the authority to remove on their behalf and did so. *See id.* As a consequence, the proper parties joined in the notice of removal, and remand for lack of consent is unfounded.

2. Filing Notice of Removal in State Court

Plaintiffs further allege that Defendants' removal was defective because they did not timely file a copy of the notice of removal with the state court. Section 1446(d) provides:

> Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.28 U.S.C. § 1446(d).

Here, Defendants filed their notice of removal in federal court on January 26, 2005, and on February 17, 2005, the Orange County District Clerk' s Office received a file-stamped copy of the notice. Plaintiffs contend that the elapse of twenty-two days between Defendants' filing their notice of removal in federal court and their filing a copy of the notice in state court was not "prompt," and, thus, removal was not properly effected. Although § 1446(d) does not define "promptly," remand may be appropriate "when there is undue

delay" in filing the copy of the notice of removal. *Parker v. Malone,* No. Civ. A. 7:030/00742, 2004 WL 190430, * at *1 (W.D. Va. Jan. 15, 2004) (citing 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3736 (3d ed. 1998)). In the context of § 1446(d), however, "the word ' promptly' has not been construed to mean simultaneously." *Manufacturers & Traders Trust Co. v. Hartford Accident & Indem. Co.,* 434 F. Supp. 1053, 1055 (W.D.N.Y. 1977); *see Whitney v. Wal-Mart Stores, Inc.,* No. Civ. 04-38-P-H, 2004 WL 1941345, at *1 (D. Me. Aug. 31, 2004) (six-month delay in filing a copy of the notice of removal in state court did not thwart the purpose of the removal statute); *Parker,* 2004 WL 190430, at *2 (twenty-two day delay in notifying the state court clerk of removal was sufficiently prompt and did not upset any statutory purpose).

Moreover, filing a copy of the notice of removal in state court is a procedural act. and failure to do so does not defeat the federal court' s jurisdiction.*See Dukes v. South Carolina Ins. Co.,* 770 F.2d 545. 547-48 (5th Cir. 1985); *Poly Prods. Corp. v. AT&T Nassau Metals. Inc.*

839 F. Supp. 1238, 1240 (E.D. Tex. 1993). "[F]ederal jurisdiction commences when the defendant files the notice of removal with the district court, and filing the notice with the state clerk affects the state' s jurisdiction rather than federal jurisdiction." *Parker,* 2004 WL 190430, at *2 (citing *Peterson* v. *BMIRefractories,* 124 F.3d 1386, 1395 (11th Cir. 1997)); *seeLindenv. Chase Manhattan Corp.,* 52 F. Supp. 2d 387, 388 (S.D.N.Y. 1999) (holding that "the jurisdiction of the federal court attaches as soon as the petition for removal is filed with it, and that both state and federal courts have jurisdiction until the process of removal is completed") (quoting *Berberian v. Gibney,* 514 F.2d 790, 792-93 (1st Cir. 1975)).

The purpose of filing a copy of the removal petition with the state court "is to inform the state district judge that he

can no longer proceed with the case until the federal court decides *. whether it will retain jurisdiction or not." *Adair Pipeline Co.* v. *Pipeliners Local Union No. 798,* 203 F. Supp. 434, 437 (S.D. Tex. 1962); *see Hampton* v. *Union Pac. R.R. Co.,* 81 F. Supp. 2d 703, 705 (E.D. Tex. 1999); 14C FEDERAL PRACTICE & PROCEDURE § 3736. A review of the state court record in the case at bar reveals that no action was taken by the state court between January 26, when the notice of removal was filed in federal court and February 17, when a copy of the notice was filed in state court. Therefore, the passage of twenty-two days prior to Defendants' tiling a copy of the notice of removal with the Orange County District Clerk did not result in any action by the state court, and the purpose of § 1446(d) would not be undermined by this court' s exercise of jurisdiction. Hence, Defendants' actions in effecting removal were reasonably prompt under the circumstances, and remand based on undue delay in filing the notice of .removal in state court is inappropriate.

3. Waiver

A defendant may waive its right to removal "by proceeding to defend the action in state court or otherwise invoking the processes of that court." *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986). This waiver, however, "must be clear and unequivocal; the right to remove is not lost by participating in state court proceedings short of seeking an adjudication on the merits." *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 428 (5th Cir. 2003) (citing *Beighley v. FDIC,* 868 F.2d 776, 782 (5th Cir. 1989) (quoting 1A JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 0.157 [9] at 153 (3d ed. 1987))); *see City of New Orleans v. Municipal Admin. Servs.,* 376 F.3d 501, 504 (5th Cir. 2004), *cert, denied,* 73 U.S.L.W. 3274 (Feb. 28, 2005); *Ortiz* v. *Brownsville Indep. Sch. Dist.,* 257 F. Supp. 2d 885, 889 (S.D. Tex. 2003). ^ Further, the waiver must "indicate a specific, positive intent to proceed in state court." *Jacko v. Thorn*

Am. icas, Inc., 121 F. Supp. 2d 574, 575 (E.D. Tex. 2000).

To determine whether there is clear and specific intent sufficient to waive removal, it is necessary to establish "whether the actions were taken by the defendant in state court for the purpose of preserving the status quo, or did they manifest an intent to litigate the merits of the claim." *Id.* at 576. ' "Actions that may result in a disposition on the merits of the state court action, in whole or in part, have also been found to evidence the requisite intent.' *"Id.* (quoting *Bolivar Sand Co.* v. *Allied Equip., Inc.*, 631 F. Supp. 171, 173 (W.D. Tenn. 1986)). In the instant case, Plaintiffs allege that Defendants waived the right to remove this lawsuit by serving "considerable discovery" before they removed the case to federal court and by sending Plaintiffs notices of intent to depose certain individuals after removal, which still bear the state court style. Defendants contend that their actions did not evince a clear and specific intent to proceed in state court.

The record reflects that, prior to removal, Defendants engaged in limited activity in state court, including filing an original answer and sending interrogatories, a request for production, and a request for disclosure to Plaintiffs. It is apparent that "[conducting limited discovery and filing counter and cross-claims does not seek a resolution of the dispute on the merits." *Hydro-Action, Inc.* v. *Jesse James*, 233 F. Supp. 2d 836, 840 n.1 (E.D. Tex. 2002). Engaging in such limited, non-dispositive activity in state court prior to removal does not demonstrate a specific and positive intent to proceed in that forum. As for the discovery propounded after removal, Defendants maintain that placing the state court style on the notices was merely a clerical error. Although Defendants' counsel should have been more careful, this oversight is immaterial and does not indicate an intent on behalf of Defendants to waive their right to remove. Accordingly, Plaintiffs' assertion of waiver is without merit, and remand on that ground is not required.

III. Conclusion

In summary, in the case at bar, both Wheatley and George consented to and joined in the notice of removal, a copy of the notice was filed in a reasonably timely manner in state court, and Defendants did not waive their right to remove this action by engaging in limited discovery in the state court action. Therefore, the removal of this case was properly effected, it falls within this court' s diversity jurisdiction, and remand is not warranted.

Accordingly, Plaintiffs' Motion to Remand is DENIED.
IT IS SO ORDERED.

SIGNED at Beaumont, Texas, this 24th day of March, 2005.

/Marcia A. Crone/
MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

Appendix 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

KEVIN NIXON and	§	
BRANDON	§	
ANCELET	§	
Plaintiffs,	§	
	§	
versus	§	CIVIL ACTION NO.
	§	1:05-CV-051
BURYL WHEATLEY	§	
and P D GEORGE	§	JURY TRIAL
COMPANY,	§	
Defendants.	§	

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND/OR CERTIFICATION UNDER 28 U.S.C. § 1292(B)

CAME ON TO BE CONSIDERED Plaintiffs' motion for reconsideration and/or certification under 28 U.S.C. § 1292(b). The Court, having considered the motion, the response, the pleadings on file herein, and the applicable law, is of the opinion that said motion is neither meritorious nor well-taken.

Accordingly, Plaintiffs' motion for reconsideration and/or certification under 28 U.S.C. § 1292(b) is DENIED.

It is so ORDERED.

Signed this the 12th day of April, 2005.

/Marcia A. Crone/
MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

Appendix 3

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 05-40579

IN RE: KEVIN	§
NIXON and	§
BRANDON	§
ANCELET	§
Petitioners	§
	§
versus	§
	§
BURYL WHEATLEY	§
and P D GEORGE	§
COMPANY,	§
Responsdents.	§

Petition for Writ of Mandamus to the United States
District Court for the
Eastern District of Texas, Beaumont

Before DEMOSS, GARZA, and CLEMENT; Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitioners' motion for stay pending writ of mandamus is DENIED.

IT IS FURTHER ORDERED that the petition for writ of mandamus be DENIED.

Appendix 4

Hays, McConn, Rice & Pickering
A PROFESSIONAL
CORPORATION
ATTORNEYS AT LAW
400 TWO ALLEN CENTER
MICHAEL M.GALLAGHER
1200 SMITH STREET
HOUSTON, TEXAS 77002
TELEPHONE (713) 654-1111
TELECOPIER (713) 650-0027

November 9, 2005

Via Facsimile: (409)
861-3529
Craig J. Schexnaider
Attorney at Law
3280 Delaware
Beaumont, TX 77703

Re: *Kevin Nixon and Brandon Ancelet v. Jiuryl Wheatley and P D George Company;* Civil Action No. 1:05-CV-51; In the United States District Court for the Eastern District of Texas, Beaumont Division

Dear Mr. Schexnaider,

Pursuant to Federal Rule of Civil Procedure 68, Defendants Buryl Wheatley and P D George Company make the following offer of judgment to your clients, Kevin Nixon and Brandon Ancelet. Defendants Buryl Wheatley and P D George Company agree to allow Plaintiffs Kevin Nixon and Brandon .Ancelet to take a judgment against them for the sum

of $45,000.00. This offer of judgment includes all of your clients' costs and attorney' s fees now accrued.

Please let me know, in writing, whether your clients accept or reject this offer within ten (10) days. I hope that this letter finds you well, and I look forward to hearing from you.

Sincerely Yours,

HAYS, McCONN, RICE
&
PICKERING

Michael M.
Gallagher

MMG

cc: Shannon Robbie
Ramirez [Firm]

Appendix 5

CONLEY • SCHEXNAIDER
Attorneys at Law
Craig J. Schexnaider, CPA William H. Conley, CPA

November 23, 2005

Mr. Michael Gallagher Via fax: *713-650-0027*
Hays, McConn, Rice &
Pickering
400 Two Allen Center
1200 Smith Street
Houston, TX 77002

Re: Civil Action No. 1:05-CV-51; *Kevin Nixon and Brandon Ancelet.v. Buryl Wheailey and P D George Company;* In the United States District Court for the Eastern District of Texas: Beaumont Division

Dear Mr. Gallagher:

My clients Kevin Nixon and Brandon Ancelet agree to take a judgment against P.D. George for the sum of $45,000.

Sincerely,

/Craig J. Schexnaider/

Craig J. Schexnaider

CJS:ksb

(409) 899-3360 3280 Delaware, Beaumont, Texas 77703
Fax (4091 899-3372

Appendix 6

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KEVIN NIXON and	§	
BRANDON	§	
ANCELET	§	
Plaintiffs,	§	
	§	
versus	§	CIVIL ACTION NO.
	§	1:05-CV-051
BURYL WHEATLEY	§	
and P D GEORGE	§	
COMPANY,	§	
Defendants.	§	

NOTICE OF ACCEPTANCE OF OFFER OF JUDGMENT PURSUANT TO RULE 68 FED. R. CIV. P.

KEVIN NIXON and BRANDON ANCELET, accept the offer of judgment made by Defendants. Plaintiffs timely accepted this offer on Wednesday, November 23, 2005. Rule 6(a) Fed. R. Civ. P. excludes Saturdays, Sundays, and legal holidays (such as Veteran' s Day and Thanksgiving Day) from computation. Plaintiffs request the clerk to enter judgment for $45,000.00 to include the costs of court.

Defendants' offer and Plaintiffs' acceptance are attached hereto as Exhibits "A" and "B" respectively and incorporated herein by reference. Plaintiffs reserve the right to appeal any interlocutory orders merged within the final judgment (to wit: denial of Motion to Remand, etc.)

Respectfully submitted,

By:

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Attorneys for Plaintiffs Brandon Ancelet and Kevin Nixon

Appendix 7

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF TEXAS

KEVIN NIXON and	§	
BRANDON ANCELET	§	
Plaintiffs,	§	
versus	§	CIVIL ACTION NO.
	§	1:05-CV-051
BURYL WHEATLEY	§	JURY
and P D GEORGE COMPANY	§	
Defendants.	§	

FINAL JUDGMENT

Defendants Buryl Wheatley and P.D. George Company made an offer of judgment under Rule 68 Fed. R. Civ. P. to Plaintiffs Kevin Nixon and Brandon Ancelet, which they timely accepted and gave notice of the acceptance.

In accordance with the above-referenced / accepted offer of judgment, it is, therefore, ORDERED and ADJUDGED that Plaintiffs Kevin Nixon and Brandon Ancelet shall collectively recover $45,000.00 from Defendants Buryl Wheatley and P.D. George Company.

The parties shall bear their own costs. This order disposes of all claims in this court and all relief not herein granted is denied.

SIGNED and ENTERED this 19th day of December, 2005 at Beaumont, Texas.

/Marcia A. Crone/
MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

Appendix 8

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-40148

KEVIN NIXON; BRANDON ANCELET
Plaintiffs - Appellants

v.

BURYL WHEATLEY; P D GEORGE COMPANY
Defendants – Appellees

Appeal from the United States District Court
for the Eastern District of Texas, Beaumont
No. 1:05-CV-51

Before KING, BENAVIDES, and CLEMENT, Circuit Judges. PER CURIAM:

"A party must reserve its right to appeal prejudgment rulings in the offer of judgment, otherwise no appeals from judgment will be allowed." Ramming v. Natural Gas Pipeline Co. of Am., 390 F.3d 366, 370 (5th Cir. 2004) (emphasis in original). Plaintiffs' failure to do so here extinguished their right to appeal, and their subsequent statement purporting to reserve this right could not resurrect it.

Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47 .5 .4 .

The Motion to Dismiss the Case is GRANTED. Appeal DISMISSED. Costs shall be borne by plaintiffs.

Appendix 9

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-40148

KEVIN NIXON; BRANDON ANCELET
Plaintiffs - Appellants

v.

BURYL WHEATLEY; P D GEORGE COMPANY
Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

ON PETITION FOR REHEARING AND REHEARING

EN BANC

[Opinion 10/27/06, 5 Cir., _____, _____ F.3d._____)

Before KING, BENAVIDES and
CLEMENT, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having

voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

(-) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

Appendix 10

FRCP 68. OFFER OF JUDGMENT

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offer is not more favorable than the offer, the offer must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Appendix 11

§1446. Procedure for removal

(d) Promptly after the filing of such notice of removal of a,:, civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

No. 06-1242

SUPREME COURT, U.S.
FILED
APR 11 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

KEVIN NIXON AND BRANDON ANCELET,

Petitioners,

v.

BURYL WHEATLEY AND P D GEORGE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition when the Fifth Circuit's order dismissing Petitioners' appeal was based on Petitioners' failure to reserve the right to appeal interlocutory orders in the offer of judgment they accepted pursuant to Federal Rule of Civil Procedure 68.

DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Buryl Wheatley and P D George Company respectfully submit the following disclosure statement:

P D George Company is a member of the ALTANA Chemie Group of Companies. There are no related or subsidiary entities. No parent or publicly-held company owns 10% or more of P D George Company's stock.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Buryl Wheatley ("Wheatley") and P D George Company ("P D George")[1] respectfully submit that the Petition for Writ of Certiorari filed by Petitioners Kevin Nixon and Brandon Ancelet ("Petitioners") should be denied.

INTRODUCTION

Petitioners seek review of an October 27, 2006 order from the Fifth Circuit Court of Appeals ("the Fifth Circuit") granting Respondents' motion to dismiss the appeal. The Fifth Circuit found that Petitioners accepted an offer of judgment pursuant to FED. R. CIV. P. 68 that did not reserve their right to appeal pre-judgment rulings. Consequently, the Fifth Circuit dismissed Petitioners' appeal. Petitioners now seek relief from that order.

Petitioners contend that this case raises important issues regarding the interpretation of Rule 68. Petitioners also claim that the Fifth Circuit's order conflicts with prior decisions from other courts of appeal. Neither contention is correct. Indeed, the Fifth Circuit's order represents a proper, logical application of Rule 68 and the cases that have interpreted it. Like every other circuit, the Fifth Circuit holds that a party that accepts an offer of judgment that does not reserve appellate rights waives the right to challenge interlocutory orders on appeal.

[1] Wheatley and P D George are referred to collectively as "Respondents."

No Circuit court of appeal, however, has adopted Petitioners' erroneous belief that they may preserve their right to appeal simply after accepting an offer of judgment by subsequently notifying the district court that they intend to appeal. Indeed, Rule 68 requires the district court to enter the judgment on which the parties have agreed. Moreover, the First, Third, Fourth, Ninth, Tenth, and Eleventh Circuits have all held that unequivocal consent to judgment precludes an appeal from that judgment.

The issue raised by the Fifth Circuit's order dismissing Petitioners' appeal is quite settled and therefore does not merit this Court's attention. Even if this Court was inclined to address this issue, this case presents no such opportunity because the record affirmatively demonstrates that Petitioners failed to reserve their right to appeal in the offer of judgment that they accepted.

In the end, Petitioners have failed utterly to carry their burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Court should deny the Petition.

STATEMENT OF THE CASE

On January 3, 2003 in Orange, Texas, a truck driven by Wheatley collided with a car driven by Nixon. (Record at 17). Ancelet was a passenger in Nixon's vehicle. (*Id.*). When the accident occurred, Wheatley was allegedly in the course and scope of his employment for P D George. (R. 18). As a result of the collision, Petitioners claimed they suffered severe personal injuries. (*Id.*).

On December 30, 2004, Petitioners sued Wheatley and P D George in the 260th Judicial District Court of Orange County, Texas. (R. 16-19). Respondents, in turn, removed this lawsuit to the Beaumont Division of the United States District Court for the Eastern District of Texas. (R. 8-30). This lawsuit was assigned to District Judge Marcia A. Crone. (R. 31-35).

Petitioners quickly filed a motion to remand. (R. 38-44). In that motion, Petitioners claimed that Respondents failed to promptly send a file-stamped copy of the Notice of Removal to the state court as required by 28 U.S.C. § 1446(d). (R. 40-41). Further, Petitioners contended that Respondents' Notice of Removal was defective because it lacked the written consent of all defendants whom they had served. (R. 38-39). Finally, Petitioners argued that Respondents waived their right to remove by serving discovery while the case was pending in state court. (R. 40-41).

Respondents responded to Petitioners' motion to remand. (R. 45-55). Shortly thereafter, Petitioners filed a supplement to their motion to remand (R. 56-166), to which Respondents also responded. (R. 167-71). After evaluating the parties' briefing, the district court denied Petitioners' motion to remand on March 24, 2005. (R. 172-81). The district court's opinion is published as *Nixon v. Wheatley*, 368 F. Supp. 2d 635 (E.D. Tex. 2005) (Pet. App. at 1a-10a).

The district court denied Petitioners' motion to remand for three reasons. (*Id.* at 5a-10a). First, the district court held that counsel for Respondents "had the authority to remove on their behalf and did so." (*Id.* at 6a). In this case, the same lawyers represent Wheatley and P D

George. (*Id.*). Consequently, "the proper parties joined in the notice of removal." (*Id.*).

Second, the district court ruled that a twenty-two day delay in filing a copy of the Notice of Removal with the state court was "reasonably prompt under the circumstances." (Pet. App. at 8a). The district court noted that most courts have not construed the word "promptly" in section 1446(d)[2] to mean "simultaneously." (*Id.* at 7a-8a). Further, the district court noted that the state court took no action between the time when Respondents filed their Notice of Removal in federal court and when Respondents sent a copy of that pleading to the state court. (*Id.* at 8a). On these facts, the district court found that exercising federal jurisdiction would not thwart the statutory purpose of section 1446(d) – to provide notice to the state court. (*Id.*). Consequently, the district court held that Respondents complied with section 1446(d). (*Id.*).

Finally, the district court held that Respondents did not waive the right to remove. (*Id.* at 9a). The district court declared that Respondents had only engaged in minimal discovery before and after removal. (*Id.*). Finding that this case fell within its diversity jurisdiction, the district court denied Petitioners' motion to remand. (*Id.*).

Petitioners filed a motion for reconsideration and/or interlocutory certification under 28 U.S.C. § 1292(b). (R. 182-92). The district court denied that motion. (Pet. App. at 11a). Petitioners then filed a petition for writ of mandamus, which the Fifth Circuit quickly denied. (*Id.* at 12a).

---

[2] All references to section 1446(d) refer to 28 U.S.C. § 1446(d) (2000).

Following this Court's denial of Petitioners' petition for writ of mandamus, the case progressed at the district court level. (R. 315-36). After serving Petitioners with discovery and filing a motion for partial summary judgment (*Id.*), Respondents presented Petitioners with an offer of judgment of $45,000.00. (Pet. App. at 13a-14a). Respondents made this offer of judgment pursuant to Federal Rule of Civil Procedure 68. (*Id.* at 13a). Further, the offer included all of Petitioners' costs and fees then accrued. (*Id.* at 14a).

On November 23, 2005, Petitioners accepted Respondents' offer of judgment in writing. (*Id.* at 15a). Counsel for Petitioners stated that his clients agreed "to take a judgment against P.D. George for the sum of $45,000." (*Id.*). Seven days later, Petitioners filed their notice of acceptance of Defendants' offer of judgment with the district court. (*Id.* at 16a-17a).

Petitioners notified the district court in writing that they had accepted Respondents' joint offer of judgment. (*Id.*). Consequently, Petitioners asked the district court to enter judgment against Respondents for $45,000.00, including costs of court. (*Id.* at 16a). Petitioners, however, also claimed that they reserved the right to appeal any interlocutory orders "merged within the final judgment." (*Id.*).

The district court entered judgment on December 19, 2005. (*Id.* at 18a). This final judgment matches Respondents' offer of judgment. (*Id.*). Additionally, the final judgment states that Petitioners "shall collectively recover $45,000.00 from Defendants Buryl Wheatley and P.D. George Company." (*Id.*).

Petitioners' notice of acceptance states that they reserve their right to appeal any interlocutory orders. (*Id.* at 16a). The final judgment, however, contains no reservation of appellate rights. (*Id.* at 18a). Instead, the final judgment states that "all relief not herein granted is denied." (*Id.*).

On January 13, 2006, Petitioners filed their Notice of Appeal with the Fifth Circuit. (R. 345-61). Petitioners stated that they would again appeal the order denying their motion to remand and the order denying their motion for reconsideration and/or interlocutory certification. (R. 345).

After the Fifth Circuit scheduled the case for oral argument, Respondents filed a motion to dismiss the appeal, to which Petitioners fully responded. The Fifth Circuit first concluded that Respondents' motion to dismiss the appeal would be "carried with the case." Days before oral argument, however, the Fifth Circuit entered an order granting Respondents' motion to dismiss. (Pet. App. at 19a).

Citing its prior opinion in *Ramming v. Natural Gas Pipeline Co. of America*, 390 F.3d 366 (5th Cir. 2004) (per curiam), the Fifth Circuit observed that a party "must reserve its right to appeal prejudgment rulings in the offer of judgment, otherwise no appeals from judgment will be allowed." (Pet. App. at 19a). The Fifth Circuit held that Petitioners' failure to do so "extinguished their right to appeal." (*Id.*). Further, the Fifth Circuit observed that Petitioners' "subsequent statement purporting to reserve this right could not resurrect it." (*Id.*). Consequently, the Fifth Circuit dismissed Petitioners' appeal. (*Id.*).

Petitioners then filed petitions for panel rehearing and for rehearing *en banc*. On December 11, 2006, the Fifth Circuit denied both petitions. (*Id.* at 20a-21a).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Fifth Circuit's order dismissing Petitioners' appeal neither conflicts with a decision of this Court or any Court of Appeals nor implicates a federal question that this Court has not decided. Consequently, Petitioners have failed to meet their burden of showing "compelling reasons" for the Court to grant their Petition. *See* SUP. CT. R. 10.

I. By Accepting An Offer of Judgment That Did Not Reserve Their Right to Challenge Pre-Judgment Rulings, Petitioners Forfeited Their Right to Appeal.

Petitioners aver that they "effectively reserved their right to appeal the order denying their motion to remand." By accepting an offer of judgment that did not reserve their right to appeal, however, Petitioners forfeited their right to appeal the judgment of the district court. Petitioners also waived their right to obtain appellate review from this Court.

Federal Rule of Civil Procedure 68 states that "a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued." FED. R. CIV. P. 68. A defendant may make an offer of judgment to a

plaintiff "[a]t any time more than 10 days before the trial begins." *Id.* The plaintiff, in turn, has ten days to accept or to reject the offer of judgment. *Id.*

If the plaintiff accepts an offer of judgment, "either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment." *Id.* Offers that are not accepted, however, are deemed withdrawn. *Id.* "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." *Id.*

As this Court has often observed, the purpose of Rule 68 is to "encourage settlement and avoid litigation." *Marek v. Chesny*, 473 U.S. 1, 7 (1985). This rule "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success on the merits." *Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451, 455 (5th Cir. 2003) (citation omitted). Because Rule 68's cost-shifting mechanism is automatic, "plaintiffs face serious consequences in either accepting or rejecting a Rule 68 offer." *Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1076 (7th Cir. 1999) (citation omitted).

To determine whether there has been a valid offer and acceptance under Rule 68, district courts apply basic principles of contract law. *Johnson v. Univ. Coll. of the Univ. of Al.*, 706 F.2d 1205, 1209 (11th Cir. 1983). In order for a contract to be formed, there must be an objective manifestation of mutual assent. *E.g., Boorstein v. City of New York*, 107 F.R.D. 31, 34 (S.D.N.Y. 1985). If the offeree substantially alters an offer of judgment or makes a counter-proposal, that offer of judgment is revoked. *United Steelworkers of Am. v. Bell Foundry Co.*, 626 F.2d 139, 141

(9th Cir. 1980). If the offeree accepts the offer of judgment as written, however, a binding contract is formed. *See id.* The parties should file the notice of acceptance and the clerk should enter the agreed-upon judgment. FED. R. CIV. P. 68.

The offer of judgment that was made to Petitioners contained no reservation of the right to appeal the district court's order denying their motion to remand. (Pet. App. at 13a-14a). Rather, Respondents agreed to have a judgment taken against them for $45,000.00. (*Id.*). When Petitioners accepted this offer of judgment, they neither mentioned nor intimated that they wished to take a second appeal of the district court's order denying their motion to remand. (*Id.* at 15a). Indeed, Appellants only stated that they accepted the offer of judgment. (*Id.*).

Seven days after they accepted the offer of judgment, Petitioners informed the district court that they reserved the right to appeal "any interlocutory orders merged within the final judgment." (*Id.* at 16a). Consequently, Appellants sought to alter the terms of the offer of judgment after acceptance. (*Id.*). An offeree, however, cannot modify or revoke the terms of an offer after it has been accepted. *See Ramming*, 390 F.3d at 370 (citation omitted).

"[A] Rule 68 offer has a binding effect when refused as well as when accepted. . . ." *Boorstein*, 107 F.R.D. at 34. Petitioners accepted an offer of judgment that did not reserve their appellate rights. (Pet. App. at 13a-17a). Although Petitioners claim that they properly reserved their rights in their Notice of Acceptance, this argument plainly misconstrues Rule 68.

Once an offer of judgment has been accepted, Rule 68 mandates that the clerk enter judgment and honor the

parties' agreement. FED. R. CIV. P. 68 ("[T]hereupon the clerk shall enter judgment."). Indeed, the clerk "must enter a judgment *accepted by the parties*." *Ramming*, 390 F.3d at 370 (emphasis added).[3] The notice of acceptance cannot modify the terms that the offeree has accepted. *Cf. id.*

The final judgment that the district court entered mirrors the offer of judgment that Petitioners accepted. (Pet. App. at 13a-17a). This final judgment does not grant Petitioners any right to challenge interlocutory orders. (*Id.* at 18a). It also precludes appellate review by this Court.[4]

Where, as here, a party consents to judgment, the act of consent waives that party's right to challenge disputed issues on appeal. *See Nashville, Chattanooga & St. Louis Ry. Co. v. United States*, 113 U.S. 261, 266 (1885) ("[F]rom a decree by consent no appeal lies." (citations omitted)); *see also Swift & Co. v. United States*, 276 U.S. 311, 324 (1928). Accordingly, the appellate court will avoid "considering the merits of the cause." *Nashville, Chattanooga & St. Louis Ry. Co.*, 113 U.S. at 266. Here, there is no express or implied reservation of the right to appeal in the judgment entered by the district court. Rather, Petitioners consented

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[3] Other circuit courts that have considered the issue have held that the district court has no discretion to modify the judgment on which the parties have agreed. *See, e.g., Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991); *Webb v. James*, 147 F.3d 617, 621 (7th Cir. 1998); *Perkins v. U.S. West Comms.*, 138 F.3d 336, 338 (8th Cir. 1998).

[4] Petitioners contend, in passing, that Respondents' offer of judgment was invalid because Wheatley and P D George jointly made it. The Court, however, need not agonize over this argument. Offers of judgment made jointly by multiple defendants to multiple plaintiffs are enforceable under Rule 68. *E.g., Johnston v. Penrod Drilling Co.*, 803 F.2d 867, 869-70 (5th Cir. 1986).

to the judgment that the district court entered. Thus, the Fifth Circuit faithfully followed this Court's precedents by dismissing Petitioners' appeal. Petitioners may not proceed any further on appeal. *See id.*

II. The Record Plainly Shows That Petitioners Accepted Respondents' Offer of Judgment And Consequently Forfeited Their Right to Appeal.

Petitioners hint that they did not consent to the final judgment that the district court entered on December 19, 2005. The record demonstrates, however, that Petitioners gave their full, unequivocal consent to the final judgment. (R. 337-43). Their consent to judgment waives their right to challenge it further.

On November 9, 2005, Respondents sent the offer of judgment to Petitioners. (Pet. App. at 13a-14a). Fourteen days later, Petitioners accepted Respondents' offer. (*Id.* at 15a).[5] Seven days after acceptance, Petitioners filed their notice of acceptance with the district court. (*Id.* at 16a-17a). The notice of acceptance begins with the following two sentences:

> KEVIN NIXON and BRANDON ANCELET, accept the offer of judgment made by Defendants. Plaintiffs timely accepted this offer on Wednesday, November 23, 2005.

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[5] Federal Rule of Civil Procedure 6(a) excludes Saturdays, Sundays, and legal holidays from computation of the ten-day deadline contained in Rule 68. Petitioners accepted Respondents' offer of judgment ten business days after they received it. (R. 340, 343). Consequently, Petitioners timely accepted Respondents' offer of judgment.

(*Id.* at 16a). Moreover, Petitioners asked the Court "to enter judgment for $45,000.00 to include the costs of court." (*Id.*).

One week after Petitioners accepted Respondents' offer of judgment (*Id.* at 15a), Petitioners stated in their notice of acceptance that they reserved the right to challenge interlocutory orders. (*Id.* at 16a). Defendants' offer of judgment, however, does not mention appellate rights. (*Id.* at 13a-14a). Under Rule 68, an offeree cannot modify or revoke the terms of an offer after it has been accepted. *See* FED. R. CIV. P. 68. Rather, the district court must enter the judgment agreed by the parties. *See id.* ("[T]hereupon the clerk shall enter judgment."); *cf. Perkins*, 138 F.3d at 338 ("Rule 68 leaves no discretion in the district court to do anything *other than enter judgment* once an offer of judgment has been accepted." (emphasis added)).

Petitioners unconditionally and unequivocally accepted Respondents' offer of judgment and asked the Court "to enter judgment for $45,000.00 to include the costs of court." (R. 337, 343). The agreed judgment entered by the district court conforms to the offer of judgment extended to Petitioners. (R. 340, 344). As the Fifth Circuit correctly noted, Petitioners simply cannot disavow their written consent to the final judgment of the district court.

III. The Fifth Circuit's Order Dismissing Petitioners' Appeal Does Not Conflict With Opinions From Other Circuit Courts.

Petitioners would have this Court believe that the Fifth Circuit's ruling conflicts with other decisions from other Circuit courts of appeal. This is not the case. Indeed,

the circuit conflict of which Petitioners complain exists only in their own imagination.

a. The Fifth Circuit – Like Every Other Circuit – Holds That Parties Must Reserve The Right to Appeal Pre-Judgment Rulings in the Offer of Judgment.

Every Circuit court of appeal that has considered the issue has held that an express reservation of the right to appeal in a consent judgment[6] or in an offer of judgment avoids waiver of contested issues that had been resolved earlier in the lawsuit. *See BIW Deceived v. Local S6*, 132 F.3d 824, 828 (1st Cir. 1997); *Keefe v. Prudential Prop. & Cas. Ins. Co.*, 203 F.3d 218, 223 (3d Cir. 2000); *Cohen v. Va. Elec. & Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986); *Slaven v. Am. Trading Transp. Co.*, 146 F.3d 1066, 1070 (9th Cir. 1998); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 527 (10th Cir. 1992); *Shores v. Sklar*, 885 F.2d 760, 763 (11th Cir. 1989) (en banc). Similarly, the Fifth Circuit holds that "[a] party must reserve its right to appeal prejudgment rulings in the offer of judgment. . . ." *Ramming*, 390 F.3d at 370. Otherwise, "no appeals from judgment will be allowed." *Id.* (citing *Shores*, 885 F.2d at 760).[7]

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[6] Judgments rendered pursuant to Rule 68 have often been treated as consent judgments. *See Shores*, 885 F.2d at 762.

[7] Petitioners contend in the alternative that even without a reservation of appellate rights, a party may appeal after accepting an offer of judgment under Rule 68. To support this argument, Petitioners rely on *Colonial Penn Insurance Co. v. Coil*, 887 F.2d 1236 (4th Cir. 1989) and *Whittaker v. Associated Credit Services, Inc.*, 946 F.2d 1222 (6th Cir. 1991). Neither case supports Petitioners' arguments. In *Colonial Penn Insurance Co.*, the Fourth Circuit reviewed and then revoked an offer of judgment due to fraud by the offeror. 887 F.2d at 1237. In *Whitaker*, the Sixth Circuit affirmed the district court's

(Continued on following page)

Indeed, the acceptance of a Rule 68 offer of judgment and the subsequent entry of judgment bar parties from appealing interlocutory orders. *Mock*, 971 F.2d at 527.

b. Petitioners Voluntarily Accepted An Offer of Judgment That Did Not Reserve The Right to Appeal Pre-Judgment Rulings.

There is precisely no dispute in the record that the offer of judgment presented to Petitioners did not reserve the right to appeal interlocutory orders. (Pet. App. at 13a-14a). Nor is there any indication in the record that Petitioners reserved the right to appeal pre-judgment rulings when they accepted the offer of judgment. (*Id.* at 15a). Consequently, Petitioners have waived their right to appellate review.

The Fifth Circuit's order granting Respondents' motion to dismiss the appeal constitutes a logical application of Rule 68's fundamental principles. The Court found that Petitioners had wholly failed to reserve their right to appeal pre-judgment rulings in the offer of judgment and in the final judgment. (*Id.* at 19a). Petitioners' subsequent attempt to reserve their right to appeal simply could not resurrect their right to appeal. In turn, Petitioners' failure to preserve their appellate rights precludes review by this Court.

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modification of an offer of judgment that had contained a typographical error. 946 F.2d at 1223. Neither situation exists in this lawsuit. Nor have Petitioners alleged that the offer of judgment was fraudulent or contained a typographical error. Consequently, *Colonial Penn Insurance Co.* and *Whitaker* are inapposite.

Petitioners aver that the Fifth Circuit was "undoubtedly influenced" by its prior decision in *Amstar v. Southern Pacific Transp. Co.*, 607 F.2d 1100 (5th Cir. 1979) (per curiam). In *Amstar*, the Fifth Circuit held that a reservation of the right to appeal in a consent judgment is ineffective. *Id.* Indeed, the Fifth Circuit went on to observe that "the fact that both parties freely consented to the entry of a final judgment precludes an appeal from it." *Id.* (citing *White & Yarborough v. Dailey*, 228 F.2d 836 (5th Cir. 1955) (per curiam)). It is telling, however, that *Amstar* makes no appearance in the Fifth Circuit's order granting Respondents' motion to dismiss. (Pet. App. at 19a). Indeed, the Fifth Circuit did not cite, much less mention, *Amstar* (*Id.*).

Before the Fifth Circuit, Respondents contended that even assuming, *arguendo*, that Petitioners reserved their right to appeal in the offer of judgment, *Amstar* mandated dismissal of the appeal. Nevertheless, the Fifth Circuit never had the occasion to consider *Amstar* because it found that Petitioners did not preserve the right to appeal in the offer of judgment. (*Id.*). To put it simply, the Fifth Circuit had no occasion either to consider or to apply *Amstar*.

In the end, Petitioners have not presented "compelling reasons" for the Court to grant this Petition for a Writ of Certiorari. *See* SUP. CT. R. 10. Petitioners have failed to demonstrate that the Fifth Circuit's order dismissing their appeal conflicts with a decision of this Court or another Court of Appeals. The Fifth Circuit – like every other Circuit – holds that parties must preserve the right to appeal prejudgment rulings in the offer of judgment and in the final judgment. Unless they do so, "no appeals from judgment will be allowed." *Ramming*, 390 F.3d at 366 (citing *Shores*, 885 F.2d at 760).

Petitioners have neither carried nor approached their burden of demonstrating that there are compelling reasons for this Court to grant their Petition. Accordingly, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondents Buryl Wheatley and P D George Company submit that the Court should deny Petitioners' Kevin Nixon and Brandon Ancelet's Petition for Writ of Certiorari.

Respectfully Submitted,

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